Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 304 of the Telecommunications Act of 1996	)	CS Docket No. 97-80
	)	
Commercial Availability of Navigation Devices	)	
	)	
Compatibility Between Cable Systems and Consumer Electronics Equipment	)	PP Docket No. 00-67

JOINT REPLY COMMENTS OF THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION, THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, THE SONGWRITERS GUILD OF AMERICA AND BROADCAST MUSIC, INC.

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THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION,
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AND BROADCAST MUSIC, INC.

The National Music Publishers' Association ("NMPA"), The American Society of Composers, Authors, and Publishers ("ASCAP"), The Songwriters Guild of America ("SGA"), and Broadcast Music, Inc. ("BMI") (hereinafter "Joint Commenters") hereby submit these joint reply comments in connection with the Commission's Further Notice of Proposed Rulemaking ("FNPRM"), FCC 03-3 (Adopted: Jan. 7, 2002; Released, Jan. 10, 2003) in the above-captioned proceeding.

I. Introduction

The fundamental concern of the Joint Commenters with respect to the copy protection scheme proposed by the parties to the Memorandum of Understanding ("MOU") is that the copyright protection scheme specified by the MOU and its associated documents (the "Proposal") does nothing to protect the *audio* part of the *audiovisual* work subject to the protection. To the contrary, the Proposal, by the complete absence of any restriction on downstream use of the audio soundtrack, offers tacit approval for device manufacturers to allow unlimited copies to be made of the audio soundtrack and to further distribute these copies across the Internet without restriction. The use of additional copy protection measures in the audio soundtrack, assuming it would be possible to resort to such a solution to repair this regulatory omission, would, according to the Proposal, be illegal.[1]

[1] As the Joint Commenters pointed out in their initial filing, the audio track and the copyrighted works that are part of it typically have economic value independent from the audiovisual work of which they are a part. The music that constitutes the soundtrack is typically licensed by the studio that is creating the television or movie programming.

The Joint Commenters have no desire to impede the effort to launch digital cable television programming, but the fact that the current version of the Proposal provides no comfort, and much discomfort, on this issue presents a great danger to the interests of songwriters, composers, and music publishers alike. The Joint Commenters hope that these issues can be resolved so that digital cable television can further develop, ushering in new forms of media distribution and business models, while satisfying both the legitimate expectations of consumers and the interests of the creators of the underlying works. The Joint Commenters believe that a set of design rules that protects the audio soundtrack while appropriately servicing the consumer can be easily derived from the same kind of design rules being proposed for the entire audiovisual work without substantial cost if such an effort is made at the present time.

For this reason, the Joint Commenters filed initial comments in this matter that focused on three basic points. First, the Commission should not adopt broad regulations that, except for certain Commission mandated instances, prohibit all copyright protection technology applied to content received in the form of digital cable television ("DCTV"). Second, the Commission should, if it decides to adopt a regulatory copy protection regime for DCTV, consider the fact that any mandated copyright protection standard for DCTV will inevitably establish a baseline copyright protection standard for all digitally delivered content, including music, and that such standard will impact additional copyrights distinct from the public performance of the audiovisual work into which the music was inserted. Third, the Commission should provide a role for both copyright owners and the Copyright Office when developing this regulatory regime governing copyright protection, because it will establish de facto the scope of fair use by specifying the scope of permissible downstream uses of recorded audio content that originated in a DCTV transmission.

The Joint Reply Commenters agree with the goals of many commenting in this proceeding, including the Motion Picture Association of America, Inc. ("MPAA"), that DCTV signals that are received and decrypted by consumer electronic devices should be protected

from further copying and redistribution in violation of the Copyright Act, and that this protection should be built into any electronic devices that receive DCTV. These Reply Comments describe our interest in avoiding adverse or unintended consequences to music publishers, songwriters and composers in the course of achieving this laudable goal. In addition, the Joint Commenters agree with the current proposal to delay the time when personal computers may receive and decrypt secure DCTV content. Finally, the Joint Commenters disagree with those who assert that the Commission has jurisdiction to decide copyright policy, interpret copyright law, or issue regulations that expand or contract the exclusive rights held by copyright owners, as adoption of the Proposal would necessarily entail.

II. Discussion

A. The Proposed Scheme and Associated Equipment Design Rules Must Protect the Audio Soundtrack.

The fundamental premise underlying the Joint Commenters' participation in this proceeding is that as formulated, the proposed DCTV copy protection scheme will damage the economic value that songwriters, composers, and music publishers hold in their copyrighted works. Digital television distributed over cable plant is, in copyright parlance, the transmission of *audiovisual* works (in the case of programming) or *audio* works (in the case of pre-programmed music channels).[2] Therefore, it follows that any separation of the "audio" from the "visual" inside an otherwise compliant consumer electronic appliance or personal

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[2] The Compliance Rules to the DFAST license permit any digital output for "Controlled Content" that is protected by DTCP or HDCP. Paragraph 2.4. However, "Controlled Content" is defined as "content... transmitted... with the encryption mode indicator bits set to a value other than zero...." Thus, the question is whether the audio separate from the video is considered "Controlled Content" if it originally was a component of an audiovisual work that was Controlled Content. Section 2.1. In addition, there is the question of when the EMI bits are set and who sets them. Also, there is the requirement to permit unlimited copying of "Unencrypted Broadcast Television", Encoding Rules § 76.19032(a).

computer, or further redistribution of the audio program in a music channel, is of great concern to the Joint Commenters. An example of the danger posed is simple: the regulations as proposed do not prohibit the audio track from being stripped from the audiovisual work, copied and then redistributed at will, including as compressed files over the Internet (*e.g.*, as MP3 files).[3] In light of this omission, the Joint Commenters absolutely disapprove of the "unconstrained right to record from all other program sources [than pay cable or pay per view]" advocated by the Home Recording Rights Coalition ("HRRC").[4] To the extent that participants in this proceeding and the Commission reach an agreement on a copy protection scheme for digitally delivered *audiovisual* works, the Joint Commenters urge that such a result be designed to prevent uncontrolled downstream use, redistribution or rebroadcast of the *audio* portion of the distributed audiovisual work or the audio program of a pre-programmed music channel.[5] To do otherwise would damage the interests of the Joint Commenters in economic spheres having nothing to do with the cable television industry. To continue with the Proposal's current formulation is to establish cable television as the new source of digital audio files available for illicit copying and distribution. It is for this reason that the Joint Commenters take issue with the absence of any prohibition on extraction of audio from the audiovisual work, the regulatory prohibition on any additional copyright protection technology applied to the signal, and the express permission to output digital audio "in the clear".[6]

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[3] The argument posed by Public Knowledge and Consumers Union that digital copying of audiovisual works is no worse than analog copying completely ignores stark distinctions that make digital copying far more dangerous. *Comments of Public Knowledge and Consumers Union* at page 9 (March 28, 2003). Digital copying can be instantaneous and without generation loss. Further, personal video recorders come with services that permit automating the recording process, such as TiVo. Further, these devices, including personal computers, can manipulate the audiovisual work to extract the audio in the clear.

[4] *Comments of HRRC* at page 4 (March 28, 2003). This approach would also eviscerate the purpose of the broadcast flag protection for over-the-air broadcast digital television as proposed by the Commission.

[5] This concern parallels the concern that MPAA has expressed relating to "unprotected" analog video and digital video outputs. *Comments of MPAA* at page 2 (March 28, 2003).

[6] See Robustness Rules, Paragraph 2. We disagree with the assertion of the National Cable & Telecommunications Association ("NCTA") that the Commission need not "endorse" a copy protection scheme: the Encoding Rules' prohibition on further copy protection technology, if adopted, are themselves an endorsement of such a scheme.

The scheme contained in the Proposal is absolutely silent on the question of limiting downstream use of the audio soundtrack. Indeed, it expressly mandates that digital audio output by DCTV receiving devices may be made "in the clear."[7] Silence on this issue becomes critical when at the same time the proposed copy protection design rules exempt any Internet functionality within the device while the proposed regulations over content make illegal any additional copy protection technology applied to the audio track.[8] In essence, the Joint Commenters are urging the participants and the Commission to recognize that to the extent creators have entrusted through license their *audio* works in order to make available the *audiovisual* works, the MOU participants and the Commission have a responsibility to ensure that regulatory decisions and policy meant to govern the use of the *audiovisual* work not

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Comments of NCTA at page 22 (March 28, 2003). The additional limitations on instituting changes to the Encoding Rules proposed by ATI Technologies and its co-commenters, by making it more difficult to revise the Encoding Rules, have the effect of making that endorsement a more permanent one. *Comments of ATI Technologies, Inc., Dell Computer Corporation, Hewlett-Packard Company, Intel Corporation, Microsoft Corporation and NEC Corporation,* at pages 7-8 (March 28, 2003).

[7] This problem is exemplified by the footnote to Intel's submission that advocates a world of unrestricted copying and re-distribution, but simply states "It goes without saying that [home networked digital content] should be done in authorized manners." *Comments of Intel Corp.,* at page 2, footnote 1. Technology must enforce this authorization or it becomes moot.

[8] If the computer industry is correct in its assertion that watermarking technology will not work, then such a fact supports the notion that the digital outputs of the audio soundtrack should be protected by means of additional copy protection technology. *Comments of ATI Technologies, Inc., Dell Computer Corporation, Hewlett-Packard Company, Intel Corporation, Microsoft Corporation and NEC Corporation.,* at page 10.

operate to the detriment of rights in the *audio* works that the participants do not possess and over which the Commission does not have jurisdiction.[9]

The NCTA, which is one of the parties to the MOU, has a stated goal of "future proofing" the technology.[10] "Future proofing" is the maintenance of equipment functionality in order that other products and services can rely on their presence in the future. NCTA's statement thus implies an intent to make it difficult to change the acceptable copy protected "business models" that are the enumerated exceptions to the regulatory rule against copy protection. Therefore, there is no comfort in the fact that the DFAST license does not now grant rights for use in machines (such as cable modems and personal computers) that use the "upstream" data stream in a cable television network.[11] If the technology is "future-proofed" then even if the DFAST license is not available now for devices that access the Internet, it will be soon or eventually – that is that stated intent of the parties to the MOU.[12] It will be too late to address the concerns of NMPA, ASCAP, BMI, and SGA when that occurs. Addressing these issues now is imperative because the economics of the consumer electronics business

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[9] As is explained in more detail in part II.D, below, the Joint Commenters vigorously disagree with the NCTA assertion that the Commission has jurisdiction over copyright law. *Comments of NCTA* at page 17. The comments of the Public Knowledge and Consumers Union stating that no "Chinese wall" between digital cable reception and the PC or the Internet is necessary because bandwidth is insufficient to support video piracy, *Comments of Public Knowledge and Consumers Union* at page 14, completely ignore the question of the soundtrack (which has lower bandwidth requirements than video), as well as the fact that there have already been cases of widespread piracy of audiovisual works originally provided over cable television. The damage resulting from copyright infringement of movies through a peer-to-peer service like Napster has already been demonstrated by the complaint filed July 20, 2000 in the case of Twentieth Century Fox Film Corp, Inc., et al. v. Scour, Inc., Civ. No. 1:2000cv05385 (S.D.N.Y.). The threat is far from "illusory." *Comments of Public Knowledge and Consumers Union* at page 15. There is also a contractual issue of whether licensees (*e.g.*, the studios or cable television networks) can, in this context, bargain away rights in copyrighted works that they do not possess.

[10] *Comments of NCTA* at pages 6, 11, and 15.

[11] The PC industry has interpreted the reference to "upstream devices" as excluding PCs and any other devices that use the cable modem to access the Internet. Another interpretation is that the DFAST license is for receiving devices, not interactive television. That is, the restriction has to do with interactivity with the TV program, not Internet access, which is exempted elsewhere. For purposes of this paragraph, the Joint Commenters assume that the PC industry is correct in its interpretation.

[12] Section 4 of the MOU binds the parties to the MOU to continue working towards an advanced version for "two-way Digital Cable Products."

would effectively prohibit the effective introduction of any satisfactory remedy to the problem at a later date.[13]

From the standpoint of composers, songwriters and music publishers, certain minimum steps must be taken. As part of any mandated equipment design rules adopted as part of a copy protection scheme for audiovisual works transmitted by DCTV, there must be a requirement that the device not create separate audio files that are extracted from the decrypted audiovisual work. In addition, any digital audio outputs should have the appropriate copy protection applied to the data stream.[14] In the case of analog outputs, efforts should be made to protect the audio with appropriate watermarking or other relevant technology, as such technology becomes available. These technical requirements should be separated from and exempt from the Encoding Rules, such that even soundtracks from Unencrypted Broadcast Television have some kind of limitation on downstream copying and distribution.

B. *Copyright Office Participation in any Regulation Governing Copyright is Essential.*

The Joint Commenters believe that the Copyright Office should be involved in any regulation that has the effect of either: (i) establishing de facto the scope of fair use when recording audiovisual works (or the audio track that is a part of the audiovisual work) broadcast over digital cable television networks, or (ii) impairing the exclusive rights of the

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[13] DFAST License Section 1.19. In addition, there would be a substantial number of legacy devices capable of inflicting this kind of harm even if such a change were instituted. The DFAST covenant does not prohibit devices that connect through modem, DSL or Ethernet. The device will not "know" whether the Ethernet is connected through a cable modem router or not. The Joint Commenters have already noted in their initial comments that the economics of the consumer electronics industry will likely result in this scheme establishing a baseline copy protection capability in home theater appliances that will be difficult to supplement later. As the Joint Commenters pointed out in their initial filing, once media center devices with Internet connectivity become prevalent in the home, it will be economically very difficult for the content providers to convince consumer electronics manufacturers to include greater capabilities for copy protection in these devices because of the increased cost sensitivity as the product category matures.

[14] The Joint Commenters that monitor and track information on public performances of audiovisual works wish to clarify their objection to any portion of the Proposal that would inhibit their ability to continue to do so. This clarification applies as well to Section C of these Reply Comments (relating to Personal Computers).

Joint Commenters with regard to the creation and distribution of copies of the soundtrack portion of the audiovisual work, even if the proponents of such impairment claim that it is justified under the doctrine of fair use as defined by the courts. The Joint Commenters believe that any regulation that sets out the scope of permissible and impermissible downstream recording functionality must be evaluated under and meet the requirements of the Copyright Act, as interpreted by the courts, not the Commission by itself or the parties to the MOU.[15] This is an area in which the Copyright Office's expertise and advice should be sought. The advocates of the Proposal hide behind the copyright principle of fair use[16] rather than admit that the Proposal would effectively change the contours of fair use. For the Commission to put its imprimatur on the Proposal would be a decision on the permissible scope of downstream copying resulting from the Commission's adoption of Encoding Rules and its acquiescence in the copying and redistribution of the audio soundtrack that will result. The Commission will be enacting a de facto definition of what constitutes fair use, without regard for what the courts say is the scope of fair use. The justification stated by the NCTA, that existing cable television content licenses and "current law" are the basis of the Encoding Rules, is hardly sufficient for offering equipment whose functionality will likely damage related rights not held by those who broadcast the programming because the functionality provides no protection at all to the audio

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[15] Although the Joint Commenters agree that private agreement can be reached regarding downstream use, the fact that the MOU has excluded any content owners from any involvement at all supports the conclusion that the Copyright Office should be involved.

[16] *Comments of HRRC* at page 3. HRRC's stated intent not to decide fair use is meaningless if the result of the Proposal is that the scope of fair use is determined de facto. Moreover, HRRC's position is that the Encoding Rules do not limit fair use, whereas the concern of the Joint Commenters is that the Encoding Rules could effectively expand fair use.

soundtrack.[17] It is neither "fair use" nor current television programming licensing practice to permit ripping of digital audio tracks from digital cable television signals and converting them into MP3 files for distribution across the Internet.

The determination of which downstream uses of the audio soundtrack are permissible should either be determined by a private agreement with the parties that hold the copyright in the audio soundtrack or by regulations issued by or in consultation with the Copyright Office. This is especially important in light of NCTA's assertion that the Commission will merely be a "backstop" to Cable Labs with regard to deciding permissible device functionality.[18] The Joint Commenters agree that consumer expectations should be considered in such a regulatory framework, but we disagree with some of the proposed downstream use permissions. For example, we agree that pay cable and pay-per-view programming should not be subject to unrestricted recording, but we disagree that any other sources of programming be subject to an "unconstrained right to record."[19] This disagreement as to the scope of fair use reinforces the conclusion that Copyright Office participation in deciding these important issues is necessary.

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[17] *Comments of NCTA* at page 13. This is compounded by the fact that the parties to the MOU excluded the MPAA from the discussion, a fact that weakens the case that the Encoding Rules are appropriate as formulated. *See Comments of MPAA* at page 2, footnote 2. Nonetheless, the studios do not necessarily own the works that are part of the soundtrack of the audiovisual works distributed, just the synchronization right. The right for the cable television operator to publicly perform the musical compositions in the soundtrack is typically administrated by ASCAP or BMI, but cable operators do not have the right to make and distribute copies of the musical works, or to authorize others to do so. That right is principally held by music publishers, most of which are affiliated with NMPA.

[18] *Comments of NCTA* at page 19.

[19] *Comments of HRRC* at page 4.

C. *The Personal Computer (PC) Should Not Be Licensed under DFAST Until Its Architecture is Demonstrably Secure.*

A number of commenters who are manufacturers of PCs and other information technology products have asked the Commission to "clarify" that such devices can participate in the DFAST license scheme.[20] The Joint Commenters, in contrast, support the notion that this regime should be available only for standalone digital cable TV equipment and not the personal computer.[21] It is out of balance for advocates of the personal computer to demand "average user" robustness rules for the content protection technology, yet at the same time demand an open bus architecture that permits third party software and hardware to access decrypted digital data as it travels within the device.[22] History bears this reasoning out: once DVD drives that could be connected to computers were introduced to the market, the DVD encryption technology (CSS) was readily cracked by a computer programmer and the "hack" made generally available for free on the Internet for use by the average user.[23] The most important lesson to learn from this is that not one, but *two* levels of robustness must be considered: first, how difficult is it to hack the copy protection scheme and second, how difficult is it to package and distribute the hack to the average user. If *either* test is easy, then

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[20] *E.g., Comments of ATI Technologies, Inc., Dell Computer Corporation, Hewlett-Packard Company, Intel Corporation, Microsoft Corporation and NEC Corporation.*

[21] This is assuming that the limitation on the DFAST license to devices that do not exploit the upstream data flow on the cable network means that personal computers are outside the purview of the license.

[22] *Comments of Public Knowledge and Consumers Union* at page 14; *Comments of ATI Technologies, Inc., Dell Computer Corporation, Hewlett-Packard Company, Intel Corporation, Microsoft Corporation and NEC Corporation.* at page 6.

[23] An increasing number of DVD copying tools are now available for the PC. See, *e.g.* http:/www.copydvd.net/order.html. The utility costs $19.95.

the scheme is not robust.[24] The Commission should wait until the personal computer has developed further as a secure content reception and playback device before it *requires* that content providers and cable television operators license personal computer manufacturers to decrypt and handle secure DCTV audiovisual content.[25]

D. *The Commission's Jurisdiction to Approve the Proposal as Submitted is Questionable.*

In their initial comments, the Joint Commenters noted that the Proposal made to the Commission could seriously undermine the ability of copyright holders to protect their legal rights, given its restrictions on their ability to implement copy protection measures. Accordingly, the Joint Commenters stated, the Proposal would raise jurisdictional problems.

Comments filed by the MPAA on this issue also question the Commission's jurisdiction. Those comments note that the Commission "cannot regulate what individual content providers may choose to put at risk, what risk, if any, is acceptable, or what price, terms, or conditions a content provider should pay, or assent to, for content protection." The rights affected by the Proposal's Encoding Rules are governed by the copyright law, Title 17 of the United States Code.[26] The Joint Commenters agree with the MPAA that provisions of the Encoding Rules are beyond the jurisdiction of the Commission.

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[24] As noted in our original Comments, piracy is an industry, not a hobby.

[25] The Joint Commenters that monitor and track information on public performances of audiovisual works believe that the Proposal, even while restricting the use of DFAST by personal computers, nonetheless must offer an adequate and reasonable opportunity for such organizations, in connection with their automated royalty compliance processes, to decrypt, monitor and copy audiovisual works using their computer systems, which may include devices in the category of personal computer. Any additional DFAST license terms for such public performance royalty compliance use must be reasonable.

[26] *Comments of the MPAA* at pages 12-13.

The particular provisions of the Encoding Rules about which the Joint Commenters expressed concern in our initial comments are the limitations on the types of content into which copy protection measures can be introduced and the limitation on the use of copy protection technology to certain "business models". The Proposal, while restricting the application of copyright protection technology, mandates digital audio outputs "in the clear" and is entirely silent on the question of protecting the audio soundtrack. This silence would establish a widespread expectation that the copyrighted works making up the soundtrack of any audiovisual work are free for the taking.

The most involved explanation of the purported basis for Commission jurisdiction in this proceeding was given in the Joint Comments of the Consumer Electronics Association and the Consumer Electronics Retailers Coalition. CEA and CERC assert that "The Commission has clear jurisdiction over every element of the package, and it has clear mandates from Congress that support enactment of the regulations" contained in the Proposal. According to CEA and CERC, the regulations are a "direct and necessary consequence of congressional mandates in 1992 and 1996."[27] The Congressional "mandates" on which it relies are Sections 624A and 629 of Title 47.

Section 624A (47 U.S.C. §544a), does not grant the Commission jurisdiction to restrict the use of copy protection measures by creators and owners of content; rather, its purpose is to regulate the technologies that may be used by cable operators in order to prevent theft of their signal and consequent loss of cable subscription revenue to those operators. This is apparent

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[27] *Comments of the Consumer Electronics Industry* at page 4.

from the numerous references throughout the section to "signal theft" and "unauthorized reception".

Section 629 (47 U.S.C. §549) is merely concerned with assuring that consumers can obtain equipment used to access multichannel video programming and other services offered over MVPD systems from sources other than the cable system operator.[28] It provides no authorization for limiting rights granted under Title 17, the copyright law. Indeed, subsection (f) explicitly states that nothing in Section 629 shall be construed as expanding (or limiting) any authority the Commission had before the section was adopted in 1996.

CEA and CERC also assert that the Commission has interpreted these sections in a way that justifies the proposed rules' provisions on copy protection. The Commission, of course, cannot by interpretation give itself jurisdiction that Congress has not granted. The Commission has not, moreover, indicated that it believes that it should adopt regulations that would limit the ability of copyright holders to protect their rights by prohibiting copy protection measures.

Certainly the Commission has stated, in various orders issued in its proceedings under Sections 624A and 629, that copy protection is a relevant issue. It has skated along the edge of saying that it can prevent the use of certain technologies that would limit consumer copying, but has not actually done so. In its September 2000 Declaratory Order under those sections, the Commission addressed "the narrow question of whether the inclusion of some copy protection within a host device violates the separation requirement of the Commission's

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[28] *Further Notice of Proposed Rulemaking and Declaratory Ruling,* In the matter of Implementation of Section 304 of the Telecommunications Act f 1996; Commercial Availability of Navigation Devices, FCC 00-341, 15 FCC Rcd 18199, at ¶2 (2000)("The purpose of Section 629 and the rules adopted thereunder is to assure consumers the opportunity to purchase navigation devices from sources other than their MVPD service provider.").

navigation device rules."[29] The navigation device rules in question required a separation of conditional access or security functions from other functions performed by navigation devices.[30] The Commission held that "Some measure of anti-copying encryption is, we believe, consistent with the intent of the rules, notwithstanding that the rules would otherwise require that all conditional access controls take place in the security control module."[31] The Commission took note of concerns by some commenters that copy protection might interfere with the ability of consumers to make fair use of certain content, but concluded that "Based on the record in this proceeding, no evidence has been presented that the evolving copy protection licenses and technology discussed herein would preclude reasonable home recording of such content."[32] The Joint Commenters agree that the Commission should not promulgate rules that are contrary to the doctrine of fair use, but believe that it is not within the jurisdiction of the Commission to determine what the scope of the fair use doctrine is. That is the domain of the courts. The same holds true for other areas of copyright law.

While the Commission has also expressed concern that the use of copy protection technology not create uncertainty with respect to the physical configuration of the equipment that consumers will use to access content over MVPD systems,[33] that concern does not justify the Encoding Rules. The potential for consumer uncertainty does not provide a rationale for a

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[29] *Id.* at ¶25.

[30] *Id.* at ¶14.

[31] *Id.* at ¶28.

[32] *Id.*

[33] Notice of Proposed Rulemaking, *In the matter of Compatibility Between Cable Systems and Consumer Electronics Equipment*, FCC 00-137, 15 FCC Rcd 8776, at 19 (2000).

rule that allows copy protection technology to be used only in connection with certain kinds of pricing or business models. If the physical configuration of equipment is consistent with the use of copy protection technology in some types of content (such as video on demand), it is consistent with the use of that same technology in other types of content (such as subscription services for which a fixed monthly fee is charged). In other words, once the receiving device is capable of operating the secure protocol that results in the decryption and display of the signal, then compatibility is established, subject to the program pricing established by the local cable provider.

NCTA also argues that an assertion of Commission jurisdiction in this matter would not pose any problem under copyright law. NCTA states that "The Courts have already held that FCC "exclusivity" rules do not run afoul of copyright jurisdiction." In support of this assertion, NCTA cites the case of United Video v. FCC, 890 F.2d 1173 (D.C. Cir. 1989).[34] The United Video decision, however, involved facts and law that simply do not support NCTA's broad assertion that the proposed Encoding Rules "are well within the FCC's jurisdiction".[35]

In United Video, the Commission had promulgated a syndicated exclusivity ("syndex") rule that allowed broadcast stations with exclusive rights to syndicated television shows to forbid cable stations from importing those programs into its local broadcast area. The petitioners, cable television companies, challenged the syndex rule as contrary to, inter alia, the Copyright Act of 1976. The Court of Appeals denied the petition for review of the

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[34] *Comments of NCTA* at p. 17 & n. 2.

[35] *Id.*

Commission's rules. The Court found that when Congress passed the Copyright Act in 1976, it was well aware of the syndex rule and chose to allow it to remain in place until the Commission decided to change it. In 1976, Congress added a provision to the copyright law giving cable companies a compulsory license to retransmit programs transmitted by broadcast companies, but only "where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission." 890 F.2d at 1184.[36] As the Court noted, the Copyright Act specifically recognized that the Commission had a rule on the subject and made the rights under the Copyright Act conditional on the Commission's decision to permit the practice. In addition to the statutory language, the Court pointed to extensive legislative history confirming that Congress had specifically tied the question of copyright liability to Commission-created communications policy. 890 F.2d at 1185-1186. No comparable statutory language and legislative history have been identified by the proponents of the Proposal in this proceeding. Moreover, NCTA neglects to mention that the Court, in the United Video decision, also stated "Of course, we are not saying that the Commission has a general power to affect copyright law." 890 F.2d at 1186, n. 8.

In sum, the Proposal of the cable MSOs and the consumer electronics industry in this proceeding exceeds the jurisdiction of the Commission insofar as it limits the ability of content creators and owners to protect their rights under the copyright law. Even if the Encoding

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[36] A compulsory license scheme provides for payment to copyright owners without the need for individual negotiations.

Rules did not contain such a limitation, the Commission should include the Copyright Office in this rulemaking proceeding, in order to gain the benefit of its expertise in the field.

III. Conclusion

NMPA, ASCAP, SGA and BMI request that the Commission address the complex but critical issues discussed above if the Commission proceeds with the proposed rulemaking.

Respectfully submitted,

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